No. 8172

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

vs.

Appellee's Reply Brief

Filed

NO. 5478

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK,
Appellant,

vs.

BERTHA E. LIPP,
Appellee.

Appellant's Reply Brief

The brief of appellee is built up almost wholly on the case of

Deposit Bank vs. Board of Councilmen, 191 U. S. 499, 48 L. Ed. 276.

We think the matter important enough to justify writing this reply brief for the purpose of giving the court our views as to what was decided in the above case.

The Deposit Bank case did not involve a direct attack upon a judgment which had been reversed on appeal. The question mooted and determined was the effect to be given to a decree which was erroneous but had become final.

In 1898 the Circuit Court of the United States for the District of Kentucky passed a decree adjudging that a contract had been entered into between the Deposit Bank and the State of Kentucky whereby the Bank was relieved of taxation on its property in consideration of the payment of certain sums prescribed by the Hewitt law. This decree in the United States Circuit Court was based wholly upon a judgment previously rendered in the State Court between the same parties. Thereafter this judgment in the State Court was reversed by the Kentucky Court of Appeals. Notwithstanding this reversal of the State Court judgment there was no direct attack made on this ground on the decree rendered in the United States Circuit Court. This decree of the United States Circuit Court was affirmed by the Supreme Court of the United States. The affirmance was based upon an even division of the judges in the United States Supreme Court and no opinion was rendered. See 174 U. S. 800, 43 L. Ed. 1187.

The foregoing was the history of the earlier litigation. At its termination the decree passed by the Circuit Court of the United States for the District of Kentucky was in full force and effect although

the opinion passed by the Kentucky Court of Appeals showed that this decree was erroneous.

The litigation determined by the case reported in 191 U. S. had its inception in an action brought by the Board of Councilmen of the City of Frankfort in the Circuit Court of Kentucky for Franklin County. They sued to collect a tax which the Bank contended was barred by the decree of the federal court in the earlier litigation. The Circuit Court for Franklin County ruled with the Bank and dismissed the petition filed by the Board of Councilmen. The Kentucky Court of Appeals reversed the judgment of dismissal and thereupon the Bank sued out a writ of error to the federal Supreme Court. This court in an opinion passed by Mr. Justice Day held that the effect to be given to the decree of the federal court presented a federal question. This question was decided in accordance with the Bank's contention, the court holding that so long as the decree of the Circuit Court of the United States for the District of Kentucky remained in full force and effect it was a bar to the action brought by the councilmen. Mr. Justice Day was mindful that a direct attack could be made upon this judgment. He qualified his opinion by the following language found on page 512 of the official report and page 281 of the report in Law Edition:

> "It is to be remembered that we are not dealing with the right of the parties to get relief

> from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based. Cooley, Const. Lim. 7th Ed. 83, and cases cited."

Applying the language of Mr. Justice Day to the facts of the present case appellant urges that it could not attack appellee's judgment at the present time in the District Court because that Court has lost jurisdiction by the perfecting of our appeal.

Citizens Bank vs. Farwell, 56 Fed. 539.

Draper vs. Davis, 102 U. S. 370, 26 L. Ed. 121, 122.

Keyser vs. Farr, 105 U. S. 265, 26 L. Ed. 1025.

The correct practice for the purpose of directly attacking appellee's judgment is undoubtedly that set forth in

Butler vs. Eaton, 141 U. S. 240, 35 L. Ed. 713, 714;

Hennessy vs. Tacoma Smelting & Refining Co., 129 Fed. 40, 43-44,

and

Ransom vs. City of Pierre, 101 Fed. 665, 670, 672.

Summarizing the contention which we are making in this reply brief we have to say that in the case at bar we are directly attacking appellee's judgment. In Deposit Bank vs. Board of Councilmen the attack was a collateral attack which on familiar grounds could not prevail.

Respectfully submitted,

McCamant & Thompson,
Ralph H. King,
Attorneys for Appellant.